

<sup>3</sup> The Board notes that, following the November 2, 2020 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include additional conditions as causally related to the accepted March 30, 2005 employment injury.

## **FACTUAL HISTORY**

This case has previously been before the Board on a different issue.<sup>4</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 31, 2005 appellant, then a 37-year-old painter, filed a traumatic injury claim (Form CA-1) alleging that on March 30, 2005 he sustained a lumbar sprain/strain due to lifting sand bags off a pallet while in the performance of duty. OWCP initially accepted that he sustained a lumbar sprain/strain and later expanded the acceptance of his claim to include displacement of lumbar intervertebral discs at L4-5 and L5-S1 without myelopathy, other complications due to other internal orthopedic device, implant and graft and disorders of the left sacrum. Appellant stopped work for various periods, commencing March 30, 2005, and OWCP paid appellant wage-loss compensation for periods of disability from work.

OWCP authorized the performance on December 9, 2005 of lumbar laminectomy and fusion surgery at L4-5 and L5-S1.

On February 11, 2008 appellant underwent additional OWCP-authorized surgery at L4-5 and L5-S1, including re-exploration of lumbar fusion with removal of pedicle screws at L4 and L5.

On March 19, 2008 OWCP expanded the acceptance of the claim to include complications due to internal orthopedic device, implant, and graft.

After developing the medical evidence, OWCP expanded the acceptance of appellant's claim on November 16, 2010 to include disorder of the left side of his sacroiliac joint.

On July 24, 2019 appellant requested that the acceptance of his claim be expanded to include additional right leg conditions causally related to the accepted March 30, 2005 employment injury. In a July 26, 2019 report, Dr. Kenneth Rosenzweig, a Board-certified orthopedic surgeon, diagnosed postlaminectomy syndrome with chronic L5 radiculopathy and pain confirmed by nerve testing involving both the right and left leg; and S1 joint dysfunction as an adjacent level syndrome from a lumbar spinal fusion status post hardware removal.

On November 8, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions, for a second opinion examination and evaluation with Dr. Jason G. Stewart, a Board-certified orthopedic surgeon. It requested that Dr. Stewart evaluate whether the acceptance of appellant's claim should be expanded to include additional conditions causally related to the accepted March 30, 2005 employment injury.

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<sup>4</sup> Docket No. 12-0645 (issued August 7, 2012).

In a December 9, 2019 report, Dr. Stewart discussed appellant's factual and medical history and reported the findings of his physical examination. He advised that appellant had no tenderness over the lumbar region upon palpation, and that range of motion of the lumbar spine revealed mild discomfort. Dr. Stewart reported that bilateral Faber testing was positive, bilateral supine straight leg raising testing was positive at 10 degrees, and seated straight leg raising testing was negative. He diagnosed fusion of the spine and postoperative arthrodesis, and noted that the herniated nucleus pulposus at L4-5 was resolved by the surgical removal of hardware. Dr. Stewart opined that there was no objective evidence to support a diagnosis of sacroiliac joint disorder connected to the March 30, 2005 employment injury. He reported that he was unable to establish additional diagnoses connected to the March 30, 2005 employment injury, specifically noting that no right lower extremity pathology was found in connection with that injury.

By decision dated December 31, 2019, OWCP denied appellant's claim, finding that he had not met his burden of proof to expand the acceptance of his claim to include additional conditions as causally related to the accepted March 30, 2005 employment injury. It determined that the December 9, 2019 opinion of Dr. Stewart carried the weight of the medical evidence.

On January 10, 2020 appellant, through counsel, requested reconsideration of the December 31, 2019 decision.

Appellant submitted a January 21, 2020 report from Dr. Kevin Collins, an attending Board-certified orthopedic surgeon, who discussed appellant's factual and medical history and reported the findings of his physical examination. Dr. Collins diagnosed herniated nucleus pulposus at L4, L5, and S1 with radiculopathy, S1 joint dysfunction, and chronic back pain due to trauma. He opined that appellant's lifting and handling of heavy sand bags on March 30, 2005, necessitated lumbar surgery and that appellant now had postlaminectomy syndrome affecting both lower extremities. Dr. Collins indicated that diagnostic testing confirmed that appellant's L5 radiculopathy was worse in the right lower extremity than in the left lower extremity.

In August 2020 OWCP determined that there was a conflict in the medical opinion evidence between Dr. Stewart and Dr. Collins regarding whether the acceptance of appellant's claim should be expanded to include additional conditions causally related to the accepted March 30, 2005 employment injury. In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of FECA (5 U.S.C. § 8123(a)), to Dr. Michael S. Clarke, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter. OWCP provided Dr. Clarke with a SOAF and a series of questions.

In a September 8, 2020 report, Dr. Clarke detailed appellant's factual and medical history and reported the findings of his physical examination. He discussed appellant's lumbar surgeries and diagnostic testing, and noted that appellant presently reported having persistent low back pain with occasional referral to his lower extremities. Dr. Clarke indicated that, upon examination, the strength of right-sided dorsiflexion was questionably slightly decreased in comparison to the left side without confirmation through atrophy. He noted that straight leg testing bilaterally produced back pain, but no significant radicular pain. Dr. Clarke indicated that appellant's "back situation can be described as an exacerbation of the preexisting congenital condition of L5[-]S1 spondylolisthesis with degenerative disc disease." He advised that spondylolisthesis, due to pars interarticularis defects, was a congenital deficit, which could cause instability and subsequent degenerative disc disease. Dr. Clarke opined that his examination of appellant showed minimal objective findings and noted, "[n]o significant radiculopathy of the right lower extremity could be

demonstrated.” He noted that x-rays demonstrated a herniated degenerative disc at L4-5 and that a magnetic resonance imaging (MRI) scan showed facet hypertrophy contributing to the abutment of the bilateral exiting L5 nerves.

By decision dated November 2, 2020, OWCP denied modification of its December 31, 2019 decision. It found that the special weight of the medical evidence regarding appellant’s expansion claim rested with the opinion of Dr. Clarke, the impartial medical specialist.

### **LEGAL PRECEDENT**

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>5</sup> The medical evidence required to establish causal relationship between a specific condition, and the employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>6</sup>

The Board has held that when the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.<sup>7</sup> However, the normal progression of untreated disease cannot be stated to constitute “aggravation” of a condition merely because the performance of normal work duties reveals the underlying condition.<sup>8</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>9</sup> For a conflict to arise, the opposing physicians’ opinions must be of virtually equal weight and rationale.<sup>10</sup> In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>11</sup>

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<sup>5</sup> *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>6</sup> *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

<sup>7</sup> *C.H.*, Docket No. 17-0488 (issued September 12, 2017).

<sup>8</sup> *Id.*

<sup>9</sup> 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

<sup>10</sup> *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

<sup>11</sup> *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>12</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP properly determined that there was a conflict in the medical opinion between Dr. Stewart, an OWCP referral physician, and Dr. Collins, an attending physician, regarding whether the acceptance of appellant's claim should be expanded to include additional conditions causally related to the accepted March 30, 2005 employment injury. In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Clarke for an impartial medical examination and an opinion on the matter.<sup>13</sup>

In a September 8, 2020 report, Dr. Clarke noted that appellant presently reported having persistent low back pain with occasional referral to his lower extremities. He indicated that, upon examination, the strength of right-sided dorsiflexion was questionably slightly decreased in comparison to the left side without confirmation through atrophy. Straight leg testing bilaterally produced back pain, but no significant radicular pain. Dr. Clarke indicated that appellant's "back situation can be described as an exacerbation of the preexisting congenital condition of L5 [-]S1 spondylolisthesis with degenerative disc disease." He advised that spondylolisthesis due to pars interarticularis defects was a congenital deficit, which could cause instability and subsequent degenerative disc disease. Dr. Clarke opined that his examination of appellant showed minimal objective findings and noted, "[n]o significant radiculopathy of the right lower extremity could be demonstrated." He noted that x-rays demonstrated a herniated degenerative disc at L4-5 and that an MRI scan showed facet hypertrophy contributing to the abutment of the bilateral exiting L5 nerves.

The Board finds that the September 8, 2020 report of Dr. Clarke raises questions that require clarification. In several parts of his report, Dr. Clarke referred to appellant not having significant radiculopathy of the lower extremities. He thereby raised the possibility of appellant having a diagnosable lower extremity condition, albeit of perhaps a lesser degree. Dr. Clarke did not adequately explain why a diagnosis of some form of a work-related lower extremity condition was not appropriate. Such clarification is especially necessary in the present case as appellant's claim has been accepted for displacement of lumbar intervertebral discs at L4-5 and L5-S1, as well as for complications related to OWCP-authorized surgery at the lumbar disc levels. In addition, Dr. Clarke did not adequately explain why the diagnostic testing of record did not demonstrate a work-related lower extremity condition.

For the above-described reasons, the conflict in medical opinion remains unresolved. Therefore, the Board will remand this case to OWCP for referral of the case record, a SOAF, and, if necessary, appellant, to Dr. Clarke for a supplemental report regarding whether the acceptance of his claim should be expanded to include additional conditions causally related to the accepted

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<sup>12</sup> S.R., Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner* (*Jack D. Lackner*), 40 ECAB 232, 238 (1988).

<sup>13</sup> See *supra* notes 10 and 11.

March 30, 2005 employment injury. If Dr. Clarke is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to a new impartial specialist for the purpose of obtaining his or her rationalized medical opinion on the issue.<sup>14</sup> After this and such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's expansion claim.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 2, 2020 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: December 22, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> *J.K.*, Docket No. 21-0007 (issued July 30, 2021); *R.H.*, Docket No. 17-1903 (issued July 5, 2018); *Harold Travis*, 30 ECAB 1071, 1078 (1979).